MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 223F** **RULING** **DEFENSE *EX PARTE* MOTION FOR ISSUANCE OF LETTERS ROGATORY UNDER SEAL** **16 MAY 2014**

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009). He was arraigned on 9 November 2011.

2. The Defense requested, *ex parte* and under seal, the Commission issue letters rogatory to the appropriate judicial authorities in France asking for assistance in obtaining a confidential report regarding the *MV LIMBURG* explosion titled, "Rapport D'Enquete Technique," and in deposing Mr. Jean Francois Perrouty and Captain Hubert Ardillon (AE 223). The Prosecution opposed the *ex parte* nature of the filing (AE 223A). Oral argument on the *ex parte* nature of the filing occurred on 23 and 27 April 2014.[1]

3. During oral argument, the Prosecution agreed, in this instance, the issuance of letters rogatory was an appropriate mechanism to request assistance on behalf of the Defense to set up interviews.[2] The Prosecution argued the filing should not have been made *ex parte*, the letters rogatory could potentially cause the Government to commit funds in violation of the Anti-Deficiency Act, and the Government should be allowed to help determine the mechanisms

[1] *See* Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 23 April 2014 from 9:04 A.M. to 10:20 A.M. at pp. 3527 – 63 and 27 April 2014 from 3:12 P.M. to 4:09 P.M. at pp. 4348 – 50.
[2] *See* Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 27 April 2014 from 3:12 P.M. to 4:09 P.M. at pg. 4349.

required to meet the Defense request. During oral argument, the Defense agreed to provide the Prosecution a copy of the proposed letters rogatory, which occurred.[3] The Prosecution later filed AE 223C, objecting to parts of the proposed letters rogatory, which requested production of potential classified information in the report, scheduling a future deposition, committing to reimburse costs, and committing to provide any "similar assistance" beyond the jurisdiction of the Commission. The Defense response (AE 223D) asserted the proposed letters rogatory did not request the production of information classified by the United States Government, and the statement of reciprocity was, in essence, boiler plate required by the United States Department of State. Defense requested the letter be issued in time to present it to a French court during the Defense's scheduled trip to France from 16-22 May 2014.

4. The Commission, in reviewing the original Defense motion (AE 223), finds the factual justification (paragraph 5) and the argument (paragraph 6) contain attorney - client work - product and strategy. This information was required for the Commission to determine the necessity of whether to issue the letters rogatory. The portions of the *ex parte* filing which contained attorney-client work product and strategy satisfy the "unusual circumstance" test contemplated by the Court of Military Appeals in *United States v. Garries*[4] requiring the information be protected. However, this same line of reasoning does not extend to the proposed letters rogatory, the scope of the requested assistance, and the potential commitment of government resources, which were properly provided to the Government to litigate.

5. The Commission finds the United States Government, in furtherance of its overarching discovery responsibilities under 10 U.S.C. § 949j and Rules for Military Commission (R.M.C.) 701 and 703, should assist the Defense in obtaining a copy of the "Rapport D'Enquete

[3] *Id.* at pg. 4349.
[4] *United States v. Garries*, 22 M.J. 288, 291 (1986).

Technique" and facilitating interviews with Mr. Jean Francois Perrouty and CAPT Hubert Ardillon. The Commission makes no finding on the necessity of deposing them and declines, at this time, to direct they be deposed. Nothing in this Order prohibits the Defense from requesting a deposition be ordered in accordance with R.M.C. 702.

6. The Commission notes the United States Department of State advises a letters rogatory should have an expression of a willingness to provide "similar assistance" to the receiving state and a willingness to provide reimbursement for costs incurred in providing the requested assistance.[5] The Prosecution, during oral argument,[6] and in its objection to the proposed letters rogatory (AE 223C), questioned the authority of the Defense and this Commission to bind the U.S. Government in this manner. The Commission does not have authority to obligate funds on behalf of or by the U.S. Government, but if necessary can craft an appropriate remedy if funding is denied. Neither this Commission, nor the Defense, can bind the U.S. Government to provide any "similar assistance" to a foreign court or commit funds incurred by a foreign court in providing the requested assistance. The Defense was unable to estimate the economic cost associated with reproducing the report or arranging a future deposition.[7] The Convening Authority must be provided the information and opportunity to utilize appropriate government payment methods prior to providing reimbursement and "similar assistance" as necessary.

7. The Defense, in its pleadings, referred to the "Rapport D'Enquete Technique" as being "confidential." The Commission does not know if any of the information in the document is classified information as the term is used in Executive Order 13526. The Defense is well aware

[5] United States Department of State, Bureau of Consular Affairs website at: http://travel.state.gov/content/travel/english/legal-considerations/judicial/obtaining-evidence/preparation-letters-rogatory html (last accessed 13 May 2014).
[6] *See* Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 23 April 2014 from 9:04 A.M. to 10:20 A.M. at pp. 3550-53.
[7] *Id.* at pg. 3554-56.

of its responsibility to safeguard classified information in accordance with federal law, regulations, and protective orders of this Commission.[8]

8. The Commission concludes:

a. AE 223, Defense *Ex Parte* Motion of Issuance of Letters Rogatory Under Seal, but not the proposed letters rogatory at Attachment A, is accepted for consideration as an *ex parte* filing to be kept UNDER SEAL until further order of this Commission or another court of competent jurisdiction;

b. The issuance and transmittal of a letters rogatory from this Commission to a French judicial authority via Defense Counsel is contemplated and authorized by 28 U.S.C. § 1781;

c. A letters rogatory was signed on 13 May 2014 (AE 223E), and provided to the parties for their transmittal to an appropriate judicial authority in France prior to the Defense's meetings with French authorities. A copy is attached to this ruling as Attachment A;

d. If it is determined the "Rapport D'Enquete Technique" contains information considered classified by the United States Government, the French Government, or the North Atlantic Treaty Organization (NATO), the Defense will take appropriate steps to protect it consistent with federal law, regulations, protective orders of this Commission, and any applicable guidance from the French Government or NATO;

e. The Defense has neither moved for depositions of either Mr. Jean Francois Perrouty or Captain Hubert Ardillon nor demonstrated under R.M.C. 702 why a deposition is required "in the interest of justice." To the extent a request for a deposition is implied in the pleadings, it is denied. The letters rogatory (AE 223E) do not contain a request for assistance in conducting a deposition;

[8] *Id*. at pg. 3550.

f. The Defense will not commit resources of the United States Government to reimburse the Government of France for costs associated with copying the report, arranging interviews, or conducting possible future depositions based on the letters rogatory. The Defense, prior to making any commitments as to funding, will provide the Convening Authority and the Prosecution sufficient factual information in a timely manner to allow the United States Government to utilize appropriate government payment methods to reimburse the Government of France for any costs it may incur; and,

g. The Office of Military Commissions can only provide "similar assistance" within the limits of its authority and jurisdiction.

9. The Commission rules:

a. So much of AE 223 as requests *ex parte* consideration, sealing of the pleading to protect attorney-client work product, and the issuance of a letters rogatory to appropriate judicial authorities in France for assistance in obtaining the "Rapport D'Enquete Technique" is **GRANTED**. The request for assistance to depose Mr. Jean Francois Perrouty and Captain Hubert Ardillon, the commitment of government funds, and a guarantee of reciprocal assistance as set out in the letters rogatory proposed by the Defense at Attachment A of AE 223 and provided to the Prosecution during oral argument is **DENIED**; however, the letters rogatory issued by the Commission does request assistance in interviewing the two (2) named individuals with a view toward a possible future deposition and offers the possibility of some reciprocal assistance;

b. So much of AE 223C as requests denial of depositions, the commitment of government funds, and a guarantee of reciprocal assistance to a French court is **GRANTED;** however, the Defense is directed to provide sufficient information to the Convening Authority in a timely

manner to allow the U.S. Government to utilize government payment methods to satisfy a request for reimbursement. The request to prevent the Defense from obtaining classified information, if it exists in the "Rapport D'Enquete Technique," is **DENIED**; and,

c. So much of AE 223D as requests a letters rogatory be issued prior to 16 May 2014 is **GRANTED**. The request for a guarantee of unquantified reciprocal assistance to a French court is **DENIED**; however such assistance can be provided within the limits of the Office of Military Commission's authority and jurisdiction.

So ORDERED this 16th day of May, 2014.

//***s***//
JAMES L. POHL
COL, JA, U.S. Army
Military Judge

ATTACHMENT A

MILITARY COMMISSION TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA v. ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI	**REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE (LETTER ROGATORY)** May 13, 2014

REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE (LETTER ROGATORY)

The United States Military Commission at Guantanamo Bay presents its compliments to the appropriate judicial authority of France, and pursuant to Article 5(j) of the 1963 Vienna Convention on Consular Relations, respectfully requests international judicial assistance to obtain discovery information and potential evidence, which may be used in a criminal proceeding before this Commission in the above captioned matter. A criminal trial where the accused is facing the death penalty in the above captioned matter is currently scheduled for trial in Guantanamo Bay Naval Station.

This Commission requests the assistance described herein as necessary in the interests of justice. The assistance requested is that the appropriate judicial authority of France authorize the release of the below named report regarding the *MV LIMBURG* explosion prepared by Mr. Jean Francois Perouty to Mr. Al-Nashiri's capital defense team on or before June 6, 2014:

Rapport D'Enquete Technique
Ministry of Ecology, Sustainable Development, and Energy
Tour Pascal B
92055 La Defense
Cedex, France

This Commission does not know if the "Rapport D'Enquete Technique" contains information, which our respective governments or the North Atlantic Treaty Organization (NATO) consider classified in nature. This Commission thus requests handling instructions or a statement as to the existence or nonexistence of classified information accompany the copy of the "Rapport D'Enquete Technique" provided in response to this request for assistance.

This Commission also requests that the appropriate judicial authority of France authorize the below named French citizens be interviewed by members of Mr. Al-Nashiri's capital defense team with a view toward possibly appearing at the U.S. Embassy in Paris to be deposed via video teleconference at a date to be determined in the future, if a deposition is determined by this Commission to be required.

(a) Mr. Jean Francois Perrouty
[redacted]
83000 Toulons, France

(b) CAPT Hubert Ardillon
[redacted]
Rouen, France

FACTS

Abd Al-Rahim Hussein Muhammed Abdu Al-Nashiri is facing the death penalty before this Commission for his alleged role in the 3 January 2000 attempted attack on the USS THE SULLIVANS, the 12 October 2000 attack on the USS COLE, and the 6 October 2002 attack on the *MV LIMBURG*. More specifically, he is charged as an alien unprivileged enemy belligerent with committing an act of perfidy in attacking the USS COLE, murder in violation of the law of war in connection with the attack upon the USS COLE, attempted murder in violation of the law of war in connection with the attack upon the USS COLE and the USS THE SULLIVANS,

committing an act of terrorism in connection with the attack upon the USS COLE and the *MV LIMBURG*, conspiracy to commit terrorism and murder in violation of the law of war, intentionally causing serious bodily harm to individuals onboard the USS COLE, attacking civilians on board the *MV LIMBURG*, attacking the *MV LIMBURG*, and endangering the safe navigation of the *MV LIMBURG* in violation of Title 10 United States Code §§ 950t(2), 950t(3), 950t(23), 950t(24), and 950t(29). In order to defend against the charges associated with the *MV LIMBURG*, it is necessary for the defense to be provided information related to the French investigation of the incident.

RECIPROCITY

The Office of Military Commissions of Alexandria, Virginia is willing to provide similar assistance, within the limits of its authority and jurisdiction, to the judicial authorities of France.

REIMBURSEMENT OF COSTS

Subject to the availability of funds, the negotiation of a purchase agreement, and, if required, an order from this Commission, the Office of Military Commissions will reimburse the judicial authorities of France for costs incurred in executing this Commission's request for letters rogatory.

Respectfully Submitted,

Date: 13 May 14

James L. Pohl,
Colonel, Judge Advocate, United States Army
Military Commission Judge
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